COURT OF APPEALS
DECISION
DATED AND FILED

April 4, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 00-2703 **Cir. Ct. No. 97-CV-144**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

ALLAN HOFFMANN AND BEVERLY HOFFMANN,

PLAINTIFFS-RESPONDENTS-CROSS-APPELLANTS,

V.

WISCONSIN ELECTRIC POWER COMPANY,

DEFENDANT-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Waupaca County: PHILIP M. KIRK, Judge. *Affirmed*.

Before Dykman, Brown and Lundsten, JJ.

¶1 PER CURIAM. In this stray voltage case, Wisconsin Electric Power Company ("WEPCO") appeals the judgment upholding the jury's verdict for money damages and the circuit court's order for abatement. Allan and Beverly

Hoffmann cross-appeal, claiming the circuit court erred in refusing to submit a special verdict question to the jury. We address each of the issues raised by the parties in turn.

¶2 Our first focus is on the relationship between the jury's finding of negligence and WEPCO's compliance with PSC orders.[1] WEPCO argues that the jury's finding of negligence cannot stand because WEPCO complied with PSC orders. In other words, WEPCO asserts that to prevail the Hoffmanns must show noncompliance with PSC orders. In response, the Hoffmanns rely on ***Kemp v. Wisconsin Electric Power Co.***, 44 Wis. 2d 571, 172 N.W.2d 161 (1969), for the proposition that "'[c]ompliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional precautions.'" ***Id.*** at 579 (quoting RESTATEMENT (SECOND) TORTS § 288C, at 39). We agree with the Hoffmanns that ***Kemp*** governs this case. While evidence of compliance with administrative regulations, guidelines or orders is relevant, it is not conclusive. Depending on the evidence, a jury is free to find negligence despite compliance with administrative orders.

¶3 To the extent WEPCO is arguing that implicit jury factual findings are in conflict with factual findings previously made by the PSC and that the jury should have been bound by PSC fact finding, WEPCO has not supported its factual argument with legal authority on point. The jury was the fact finder in this negligence trial and WEPCO has presented no authority for the proposition that an agency's factual findings are binding on a jury.

[1] The "PSC orders," or "PSC findings of fact," are docket nos. 05-EI-106, 05-EI-108 and 05-EI-115, which include findings of fact, conclusions of law and orders. The findings of fact, conclusions of law and orders are not specific to the Hoffmann farm.

¶4 Second, we turn to whether there was sufficient evidence to sustain the jury's negligence verdict. In this respect, our standard of review is very narrow. *See* ***Morden v. Continental AG***, 2000 WI 51, ¶38, 235 Wis. 2d 325, 611 N.W.2d 659. We sustain the jury's verdict if there is any credible evidence to support it. *See* ***Koffman v. Leichtfuss***, 2001 WI 111, ¶48, 246 Wis. 2d 31, 630 N.W.2d 201. It is not our job on review to second-guess the jury; even if there is evidence supporting an inference not reached by the jury, as long as there exists any credible evidence in favor of the jury's result we will affirm. *See* ***Morden***, 2000 WI 51 at ¶39. Finally, our standard of review is even more constricted if the trial court approved the jury's result in post-verdict proceedings. *See* ***Kuklinski v. Rodriguez***, 203 Wis. 2d 324, 331, 552 N.W.2d 869 (Ct. App. 1996).

¶5 WEPCO argues that there is no evidence to support the jury's finding that WEPCO was negligent in relying on PSC findings of fact. WEPCO states that according to PSC findings of fact, WEPCO's manner of distributing electricity can only harm livestock if it passes through the animal. Furthermore, according to WEPCO, the PSC has determined that cow contact measurements are the only way to determine the effects of electrical current on cows. WEPCO argues that its reliance on these PSC findings was reasonable, that there was no testimony at trial that such reliance was unreasonable, and that therefore the jury's finding of negligence cannot stand.

¶6 The jury, however, was free to decide that the Hoffmanns' evidence proved WEPCO negligent despite its reliance on PSC conclusions that cow contact measurements were the exclusive measure for livestock harm. Gerald Bodman, an agricultural engineer retired from the University of Nebraska, testified that the cow contact measurement techniques do not provide all the necessary information about the cows' environment. Dr. Andrew Johnson, a dairy

veterinarian, stated that cow contact measurement is just the "tip of the iceberg." Johnson also agreed with a presentation given by Bodman, in which Bodman stated that persons conducting stray voltage investigations should consider ground currents as well as cow contact measurements. Johnson further testified that he would never subject his or his clients' livestock to levels of current recommended by the USDA because he has seen lower levels cause stray voltage problems. Finally, both Bodman and William English, a utility engineer specialist retired from the Michigan Public Service Commission, opined that WEPCO was negligent in its choice of system and testing procedures at the Hoffmann farm. Given this testimony, the jury could reasonably conclude that there were other reliable measures of livestock harm, despite the PSC's endorsement of cow contact measurements, and that it was negligent of WEPCO to rely solely on the cow contact protocol.

¶7 Third, we turn our attention to the circuit court's abatement order, which WEPCO argues was an erroneous exercise of discretion. After upholding the jury's finding of nuisance, it fell upon the circuit court to fashion a remedy to abate that nuisance. *See* ***Nosek v. Stryker***, 103 Wis. 2d 633, 643, 309 N.W.2d 868 (Ct. App. 1981). The circuit court determined that WEPCO must install an overhead, ungrounded system. WEPCO claims that the circuit court did not make adequate express findings of fact to justify its choice of remedy, that the circuit court failed to consider relevant safety and reliability factors, that the evidence does not support the scope of the injunction, and that the circuit court erred in not deferring to the PSC regarding the choice of system. In response, the Hoffmanns argue that the circuit court considered the relevant evidence and properly exercised its discretion in ordering the abatement.

¶8 The decision to grant an injunction, the form of the injunction, and the scope of the injunction are within the broad discretion of the circuit court. *See* ***City of Wisconsin Dells v. Dells Fireworks, Inc.***, 197 Wis. 2d 1, 15, 539 N.W.2d 916 (Ct. App. 1995). Discretion, however, is not unfettered decision-making power. *See* ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). In this context, a court misuses its discretion when it:

> (1) fails to consider and make a record of the factors relevant to its determination; (2) considers clearly irrelevant or improper factors; and (3) clearly gives too much weight to one factor.

Sunnyside Feed Co. v. City of Portage, 222 Wis. 2d 461, 471, 588 N.W.2d 278 (Ct. App. 1998). When reviewing a circuit court's discretionary decision, "[w]e search the record for reasons to sustain the court's discretionary decision." ***Tralmer Sales & Serv., Inc. v. Erickson***, 186 Wis. 2d 549, 573, 521 N.W.2d 182 (Ct. App. 1994).

¶9 In arguing that the circuit court erroneously exercised its discretion in ordering an overhead, ungrounded delta system, WEPCO complains that the judge did not make sufficient express findings of fact. However, express fact finding is not required. "The court on appeal will … assume when a finding is not made on an issue which appears from the record to exist, that it was determined in favor of or in support of the judgment." ***Sohns v. Jensen***, 11 Wis. 2d 449, 453, 105 N.W.2d 818 (1960).

¶10 WEPCO never argues that the overhead, ungrounded system ordered by the circuit court is unsafe or unreliable. Without citation to the record, WEPCO states that Bodman's report "opine[s] that an ungrounded overhead system was inferior to an overhead grounded system." Even assuming WEPCO

has accurately characterized Bodman's report, this statement does not show a misuse of discretion by the circuit court; Bodman's report, as characterized by WEPCO, does not say an overhead, ungrounded system is unsafe or unreliable.

¶11 WEPCO also asserts that it is "implicit" in the circuit court's decision that once the jury found a nuisance existed, the Hoffmanns were "entitled" to a system that minimized the potential for earth current affecting their livestock. WEPCO argues that this is an erroneous standard because the Hoffmanns were only entitled to abatement, not the safest alternative. However, WEPCO has not pointed to any place in the record where the circuit court asserts it must pick the safest alternative, or, for that matter, that the court believed it had selected the safest alternative.

¶12 The crux of WEPCO's argument is that the circuit court was required to address and reject, as not feasible or not safe, all other options proposed by WEPCO before it could reasonably select the overhead, ungrounded system as a remedy to cure the stray voltage problem. For example, WEPCO asserts that a required finding in support of the circuit court's order was a finding that "a new overhead, grounded system would ... be negligent." Similarly, WEPCO complains that the circuit court "made no factual finding that installation of a new state-of-the art underground, multi-grounded system would result in the continued presence of a nuisance." The flaw in this argument is that WEPCO fails to show that the circuit court was required to eliminate possible alternatives before selecting a viable abatement alternative.

¶13 Finally, WEPCO argues that the circuit court "erred in not deferring to the primary jurisdiction of the PSC." WEPCO argues that under the doctrine of primary jurisdiction, courts must defer to agencies with "special competence."

We have reviewed the cases cited by WEPCO in support of this argument and find none that addresses the situation here: a lawsuit in which a fact finder finds a party negligent and a judge is asked to fashion a remedy. We conclude that the circuit court's decision not to defer to the PSC was within the discretion of the circuit court, *see* ***City of Brookfield v. Milwaukee Metropolitan Sewerage Dist.***, 171 Wis. 2d 400, 420, 491 N.W.2d 484 (1992), and WEPCO has made no showing that the circuit court misused that discretion.

¶14 We turn now to the cross-appeal. The Hoffmanns challenge the circuit court's refusal to submit to the jury the question whether WEPCO's conduct was willful, wanton, or reckless. After the verdict, the circuit court refused to submit the willful, wanton, or reckless verdict question to the jury, stating that it believed that the verdict prepared adequately covered the evidence in the case. The Hoffmanns contend that this was error.[2]

¶15 Whether the evidence warrants submitting a matter to the jury is a question of law we review *de novo*. *See* ***Walter v. Cessna Aircraft Co.***, 121 Wis. 2d 221, 231, 358 N.W.2d 816 (Ct. App. 1984). To give the issue to the jury, the circuit court must conclude that sufficient evidence has been presented such that a reasonable jury could find punitive damages appropriate. *See* ***Lievrouw v. Roth***, 157 Wis. 2d 332, 344, 459 N.W.2d 850 (Ct. App. 1990).

[2] The submission of the willful, wanton, or reckless question to the jury related to the potential imposition of treble damages. WISCONSIN STAT. § 196.64 (1999-2000) provides for an award of treble damages when a public utility willfully, wantonly, or recklessly violates its statutory duties. Thus, as the parties agree, treble damages are only appropriate when the jury finds that the utility has violated chapter 196 or 197 and that the violation was willful, wanton or reckless.

¶16 We agree with the circuit court that the evidence did not support submission of the willful, wanton, or reckless issue. WEPCO's testing at the Hoffmann farm and compliance with PSC orders belie a claim of "aggravated conduct which represents a major departure from ordinary negligence." ***Wangen v. Ford Motor Co.***, 97 Wis. 2d 260, 293 n.18, 294 N.W.2d 437 (1980) (defining reckless disregard) (citations omitted).

¶17 In conclusion, we affirm the circuit court's decision to uphold the jury's verdict because the record supports that verdict. We affirm the order of abatement because its issuance was within the discretion of the circuit court. Finally, on the cross-appeal, we affirm the court's refusal to submit a verdict to the jury regarding willful, wanton, or reckless conduct on the part of WEPCO.

By the Court.—Judgment affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5.